Filed 1/9/15 P. v. Gonzalez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAFAEL MARROQUIN GONZALEZ,

Defendant and Appellant.

F067033

(Super. Ct. No. DCF179112A)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. H.N. Papadakis, Judge. (Retired Judge of the Fresno Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Peter J. Boldin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

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In 2007, defendant Rafael Marroquin Gonzalez was convicted of evading a police officer and second degree burglary and sentenced to three years of probation. In 2013, Gonzalez asked the trial court to dismiss his convictions pursuant to Penal Code section 1203.4.[1] The trial court denied him relief.

On appeal, Gonzalez contends he was entitled to the requested relief as a matter of right under the version of section 1203.4, subdivision (a), in effect in 2007. Alternatively, he argues the trial court erred in denying him relief as a matter of discretion and in the interests of justice under section 1203.4, subdivision (c)(2).

We conclude the 2007 version of section 1203.4 does not apply in this case and the trial court did not abuse its discretion by denying Gonzalez relief as a matter of discretion with respect to count 1. The parties agree, however, that Gonzalez is entitled to relief as a matter of right as to count 2. Accordingly, we affirm the court's ruling with respect to count 1, but we vacate the court's order and remand with instructions to enter a new order as to count 2.

FACTS AND PROCEDURAL HISTORY

The Tulare County District Attorney filed a felony complaint against Gonzalez based on events that occurred on February 24, 2007. Gonzalez was charged with evading an officer (Veh. Code, § 2800.2, subd. (a); count 1) and second degree burglary (§ 459; count 2). (Two additional counts were alleged but apparently were later dismissed.)

In March 2007, Gonzalez entered a plea of nolo contendere to counts 1 and 2. Before accepting the plea, the trial court confirmed that Gonzalez understood that the maximum sentence for each count was three years and a $10,000 fine. In June 2007, the trial court ordered Gonzalez to serve 180 days in jail for count 1 and 185 days for count 2, to run consecutively, and granted probation for a period of three years.

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1 All further unidentified section references are to the Penal Code.

On June 21, 2010, after he completed probation, Gonzalez filed a petition for dismissal in propria persona. Gonzalez requested that his convictions be set aside pursuant to section 1203.4.[2]

The People filed an opposition to the petition. The opposition indicates that Gonzalez also sought dismissal of his convictions in three other criminal cases, as the People discussed Gonzalez's offenses in three cases in addition to the current case. Specifically, in 1993, Gonzalez was convicted of misdemeanor driving under the influence of alcohol or drugs (Veh. Code, § 23152, subd. (a)) and misdemeanor driving while having a 0.08 percent or higher blood alcohol level (*id*., subd. (b)); in 1999, he was convicted of misdemeanor corporal injury to a spouse or cohabitant (§ 273.5, subd. (a)); and, in 2007, he was convicted of obstructing or resisting an officer (§ 69).

With respect to the 1993 convictions, the People argued Gonzalez was not eligible for relief as a matter of right because he had been convicted of a Vehicle Code violation excepted from section 1203.4, subdivision (a). The People asserted that Gonzalez was only eligible to seek discretionary relief under section 1203.4, subdivision (c)(2), and "the interests of justice and safety of the community demand denial of discretionary relief."

On August 27, 2010, Judge Gerald Sevier denied Gonzalez's petition in the current case without prejudice. The record indicates that a few days earlier, Gonzalez was granted relief under section 1203.4 for his convictions in the three other criminal cases.[3] With respect to the current case, however, the judge expressed concern about

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[2] He also requested, alternatively, that the convictions be reduced to misdemeanors under section 17.

[3] At the beginning of the hearing on August 27, 2010, the judge observed that the People had no objection to granting Gonzalez's application in three of his criminal cases. The attorney for the People then told the court that all the requests had been granted except this case. The judge stated, "Yeah, I granted those the other day, but I didn't have time to take this up." The record on appeal does not contain the court's orders in the three additional criminal cases.

Gonzalez's conviction under the Vehicle Code. Judge Sevier noted that Gonzalez had a subsequent misdemeanor conviction in 2009 for violation of section 273.5, corporal injury to a spouse or cohabitant, and further observed that the offenses in the current case were "very serious crimes." He then explained to Gonzalez, "[I]t's just too recent for me to grant you this relief." The judge continued: "So I'm saying no now, but you continue to apparently be on the path you're on and come back I'd say two years. [¶] … [¶] … I'm not making any promises to you, either. I'm saying right now no. [¶] So good luck to you."

On January 17, 2013, Gonzalez filed a second request to set aside his convictions under section 1203.4.[4] In support of his request, Gonzalez explained that his status as a legal resident would expire "in the near future" and he was "aware of the potential adverse effects these convictions may have on his ability to renew his legal residency." He also intended to seek American citizenship and was concerned about the impact the convictions would have on his citizenship application. Further, although he was disabled, Gonzalez wanted to be able to seek meaningful employment, but he understood that "a background check will hinder his chances of gaining meaningful employment in the future." He acknowledged there was no "guaranteed expungement" as to the Vehicle Code conviction, but asked the court to consider the fact that the court found him "redeemable to a certain extent two years ago in granting relief" in his three other criminal cases. Gonzalez stated that he had "stayed out of trouble since 2009."

The People again opposed Gonzalez's request for relief. They asserted that expungement of his convictions pursuant to section 1203.4 would not relieve Gonzalez of the immigration consequences of the convictions. They also argued that, if Gonzalez were granted relief, he could not subsequently be prosecuted as a felon in possession of a

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[4] Again, Gonzalez also asked for relief under section 17. This time, he was represented by an attorney.

firearm and urged the court to "carefully weigh the nature of [Gonzalez's] felony violation with the safety of the community."

On March 20, 2013, the court denied Gonzalez's motion. Judge H.N. Papadakis determined that Gonzalez was not entitled to relief as a matter of right and then explained that neither immigration considerations nor employment prospects warranted granting discretionary relief. The judge stated:

> "Court reviewed this once again, and there are several concerns here. [¶] To begin with, … as the People state, there's no statutory, legal right for the court to reduce this. Reading the history of this, apparently, there were other cases, other convictions that were set aside two years ago, … [so] this is not an isolated criminal event.
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> "There is also the issue the District Attorney brings up, and I read over again the request, the motion, and for purpose of citizenship, [it] does no good for the court to [grant relief under sections] 17[, subdivision](b) or 1203.4, and for purpose of employment, defendant is not employed and doesn't show any likelihood of getting employment in the near future. This court has granted these previously. [¶] Factors such as that don't exist. Where there's a specific job available, did one in this very court last month where there was a job. By granting the [section] 1203.4, the job was available, without it, it wasn't.
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> "So with those factors, the court will once again deny the motion."

Gonzalez filed a notice of appeal on April 5, 2013.

DISCUSSION

I. The version of section 1203.4 in effect in 2007 does not apply in this case

Gonzalez's conviction in count 1 is for a statutory violation specifically excepted from relief as a matter of right under section 1203.4. This exception to section 1203.4 was added by the Legislature in 2007, became operative in 2008, and was in effect when the court denied Gonzalez relief in 2013. Gonzalez contends, however, that he was entitled to application of the version of section 1203.4 that existed at the time he entered his plea and was sentenced to probation and, therefore, he should have been granted relief as a matter of right.

A. Section 1203.4

Section 1203.4, subdivision (a), "allows for probationers to have their convictions set aside and the accusations against them dismissed, and … provides that, with specified exceptions, such a defendant 'shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted.'" (*People v. Vasquez* (2001) 25 Cal.4th 1225, 1228.) "With certain exceptions, a court is required to grant [a] defendant the relief he requests if the defendant has fulfilled the conditions of his probation for the entire period." (*People v. Mgebrov* (2008) 166 Cal.App.4th 579, 584.)

At all relevant times, section 1203.4, subdivision (a), has provided, in pertinent part:

> "In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, … or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant *shall*, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, *be permitted by the court* to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and *except as noted below*, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle Code." (Italics added.)[5]

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5 The above quoted language is found in both the version of section 1203.4 effective in 2013 when Judge Papadakis denied Gonzalez relief and the version of section 1203.4 effective in 2007 when Gonzalez committed the offenses, entered a plea, and received probation. (See former § 1203.4, subd. a)(1), as amended by Stats. 2011, ch. 285, § 17, eff. Jan. 1, 2012; former § 1203.4, subd. (a), as amended by Stats. 2005, ch. 705, § 5, eff. Oct. 7, 2005.)

B. 2007 amendment to section 1203.4

In 2007, the Legislature amended section 1203.4 to add the following language:

> "(c) (1) Except as provided in paragraph (2), subdivision (a) does not apply to a person who receives a notice to appear or is otherwise charged with a violation of an offense described in subdivisions (a) to (e), inclusive, of Section 12810 of the Vehicle Code.
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> "(2) If a defendant who was convicted of a violation listed in paragraph (1) petitions the court, the court in its discretion and in the interests of justice, may order the relief provided pursuant to subdivision (a) to that defendant." (Stats. 2007, ch. 161, § 1, eff. Jan. 1, 2008.)

Under the 2007 amendment to section 1203.4, a person with a conviction for an offense listed in Vehicle Code section 12810, subdivisions (a) through (e), is no longer entitled to relief as a matter of right under section 1203.4, subdivision (a). Vehicle Code section 12810, subdivision (d), lists, among other offenses, violation of Vehicle Code section 2800.2. Gonzalez's conviction of count 1 in the current case is for violation of Vehicle Code section 2800.2.

This change in the law went into effect on January 1, 2008. (Stats. 2007, ch. 161, § 1, eff. Jan. 1, 2008; Cal. Const. art. IV., § 8, subd. (c)(1).)

C. A grant of probation does not include an implicit promise that the defendant later will be entitled to application of the version of section 1203.4 in effect at the time the defendant enters a plea or receives his sentence of probation

Gonzalez argues that the trial court violated his federal and state due process rights "when it[] failed to fulfill the implicit promise of relief under … section 1203.4 as enacted at the time of his plea that he was entitled to when he was placed on probation and fulfilled his conditions of probation." (Boldface omitted.)

Gonzalez relies on *People v. Arata* (2007) 151 Cal.App.4th 778 (*Arata*), but that case is distinguishable. In *Arata*, the defendant reached a plea agreement pursuant to which he entered a guilty plea to one count of lewd or lascivious conduct upon a child (§ 288, subd. (a)) with the understanding that he would not be sentenced to prison. He

was placed on probation for five years. (*Arata*, *supra*, at p. 781.) Later, in 1997, the Legislature amended section 1203.4 to make relief unavailable for certain sex offenses, including violation of section 288. In 2005, the defendant moved to withdraw his guilty plea and dismiss the charge under section 1203.4. The defendant asserted that he was seeking to enforce his plea bargain. (*Arata*, *supra*, at p. 781.) He submitted a declaration stating that he discussed the plea bargain with his attorney and was told that if he successfully completed probation, he would be able to withdraw his plea and have his case dismissed under section 1203.4. He stated that the promise of section 1203.4 relief was a motivating factor in agreeing to enter a plea. The trial court denied the defendant's motion based on the 1997 amendment to section 1203.4, which precluded relief for a section 288 conviction. (*Arata*, *supra*, at p. 782.)

On appeal, the defendant argued that applying the 1997 amendment to section 1203.4 to deny him relief was a violation of due process because it violated his plea bargain. (*Arata*, *supra*, 151 Cal.App.4th at p. 786.) The Court of Appeal agreed. Although the promise of section 1203.4 relief was not an express term of the plea bargain, the court determined it was an implied term. The court explained: "By agreeing to give [the] defendant probation, the plea bargain implicitly included the promise of section 1203.4 relief as part of probation. Section 1203.4 relief was within '[the] defendant's contemplation and knowledge' when he entered his plea. [Citation.]" (*Arata*, *supra*, at p. 787.) The court concluded, "Since defendant's plea rested in a significant degree on the promise of eventual section 1203.4 relief, such promise must be fulfilled." (*Id*. at p. 788.)

In the present case, however, there is no evidence that Gonzalez relied on the promise of eventual section 1203.4 relief in deciding to enter a plea. Gonzalez does not point to anything in the record that demonstrates that he was promised probation in exchange for his plea. He submitted a declaration in support of his request for relief, but he did not state in the declaration that the promise of section 1203.4 relief was a

motivating factor in making his plea. Since there is no evidence that Gonzalez's "plea rested in a significant degree on the promise of eventual section 1203.4 relief," the reasoning of *Arata* does not require application of the 2007 version of section 1203.4 in this case. (*Arata, supra*, 151 Cal.App.4th at p. 788.)

Our Supreme Court recently rejected the argument that plea agreements generally include an implicit promise that the parties will be bound only to the law in effect at the time the agreement is made. In *Doe v. Harris* (2013) 57 Cal.4th 64, 66 (*Doe*), the court held the fact "[t]hat the parties enter into a plea agreement … does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them." The court explained: "[T]he general rule in California is that plea agreements are deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. As an adjunct to that rule, and consistent with established law holding that silence regarding a statutory consequence of a conviction does not generally translate into an implied promise the consequence will not attach, prosecutorial and judicial silence on the possibility the Legislature might amend a statutory consequence of a conviction should not ordinarily be interpreted to be an implied promise that the defendant will not be subject to the amended law." (*Id.* at p. 71, fn. omitted.) Accordingly, Gonzalez may not rely on the mere existence of a plea agreement to establish a right to the application of the 2007 version of section 1203.4 in this case. (And, as we have mentioned, Gonzalez has not established that there was a plea agreement in his case.)

We also reject Gonzalez's argument that, by placing him on probation, the trial court implicitly promised him that relief under the version of section 1203.4 in effect at the time of sentencing would be available later when and if he successfully completed probation.

In *People v. Chandler* (1988) 203 Cal.App.3d 782, 788, the court observed that a grant of probation is "in effect, a bargain made by the People, through the Legislature and

the courts, with the convicted individual, whereby the latter is in essence told that if he complies with the requirements of probation, he may become reinstated as a law-abiding member of society." The *Chandler* court further observed, "As an additional inducement, the '[r]emoval of the blemish of a criminal record' is held out through the provisions of Penal Code section 1203.4. [Citation.]" (*Ibid*.) Yet, if we view the grant of probation in this case as a contract, the reasoning of *Doe* applies. That is, just as a plea agreement is "deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy" (*Doe, supra,* 57 Cal.4th at p. 71), the "bargain" made by the trial court's grant of probation (*Chandler, supra*, at page 788) must be deemed to incorporate the state's power to amend the law.

We are not the first appellate court to reach this conclusion. In *People v. Smith* (2014) 227 Cal.App.4th 717, 731, the Court of Appeal explained that the grant of probation is a "contract between the People, the defendant, and the court" and, as such, it "must be subject to the same rules as those that govern plea bargains and other contracts, as stated in *Doe*." Therefore, the court concluded, "in the absence of constitutional constraints, a probationer's entitlement to relief under section 1203.4 is not frozen at the time of the probationary grant but is subject to subsequent legislative amendments to the statute." (*Ibid*.) Following *Doe* and *Smith*, we conclude that the trial court's grant of probation in this case did not include an implicit promise to Gonzalez that years later he would be able to seek relief under the version of section 1203.4 in effect at the time he was sentenced to probation.

Gonzalez's attempt to distinguish *Doe* is not persuasive. He argues that the facts of *Doe* are distinguishable because the change in law at issue in that case (the Sex Offender Registration Act, § 290 et seq.; see *Doe, supra,* 57 Cal.4th at p. 65) "was directed for the public good and in pursuance of public policy," but the 2007 amendment to section 1203.4 at issue in this case does "not specifically benefit the public good." The Attorney General asserts the 2007 amendment to section 1203.4 was intended "as a

public safety matter which could prevent dangerous drivers from masking their records." Gonzalez responds that, before the 2007 amendment, section 1203.4, subdivision (a), already referred to Vehicle Code section 13555, which provides that dismissal of charges pursuant to section 1203.4 does not affect any revocation or suspension of the privilege to drive a motor vehicle. He argues, "Because section 1203.4 already contains a provision to protect the public from dangerous drivers by maintaining the restrictions on those convicted of certain Vehicle Code violations, the amendment to section 1203.4 is not one which was made for the public good but rather, it is intended to be a disability on certain defendants from securing relief." However, the existence of Vehicle Code section 13555 does not show that the 2007 amendment to section 1203.4 was not intended as an *additional* measure to protect the public from dangerous drivers. We observe that, in support of the 2007 amendment, the author of the legislation argued: "'If a violation is expunged from a person's DMV record they may apply for a job as a nanny and the employer would be none the wiser that the person driving their child around has been convicted of a DUI.'" (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 645 (2007-2008 Reg. Sess.) June 28, 2007.) This suggests the amendment was in fact intended to protect the public from dangerous drivers by requiring persons with certain Vehicle Code convictions to disclose those convictions to potential employers (unless the person so convicted is granted discretionary relief under section 1203.4, subdivision (c)(2)). Gonzalez has failed to show that the 2007 amendment to section 1203.4 was not made for the public good, and we will not presume the Legislature had no purpose of benefiting the public good or pursuing public policy by excluding certain Vehicle Code offenses from relief as a matter of right under section 1203.4, subdivision (a). Consequently, the reasoning of *Doe* applies, and Gonzalez is not insulated from the effect of the 2007 amendment to section 1203.4. (See *Doe*, *supra*, at p. 66.)

D. Applying the 2007 amendment to section 1203.4 to Gonzalez does not violate the prohibition against ex post facto legislation

"Both the federal and California Constitutions contain provisions prohibiting ex post facto laws. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) Included within the ex post facto prohibition is any law that retroactively increases the punishment for a criminal act. [Citation.] The ex post facto clause does not prohibit all increased burdens; it only prohibits more burdensome punishment." (*People v. Acuna* (2000) 77 Cal.App.4th 1056, 1059 (*Acuna*).)

Gonzalez contends that the application of the 2007 amendment to section 1203.4 was retroactive and violated the prohibition against ex post fact legislation because it attaches a new disability to his 2007 convictions.

The Court of Appeal rejected similar arguments in *Acuna*. In that case, the defendant entered a guilty plea to one count of lewd or lascivious conduct with a child under age 14 in violation of section 288, subdivision (a), in 1993 and was sentenced to probation for five years. (*Acuna*, *supra*, 77 Cal.App.4th at p. 1058.) As noted in our discussion of *Arata*, in 1997, section 1203.4 was amended to prohibit relief for convictions under section 288. In 1999, the defendant moved to have his conviction dismissed, and the trial court denied the motion based on the 1997 amendment to section 1203.4. On appeal, the defendant argued that application of the 1997 amendment to his case violated the constitutional ban on ex post facto laws. (*Acuna*, *supra*, 77 Cal.App.4th at p. 1059.)

The *Acuna* court addressed the question "whether eliminating the possibility for expungement[**6**] of a conviction for violating section 288 constitutes a punishment."

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6 We note that "[s]ection 1203.4 does not, properly speaking, 'expunge' the prior conviction." (*People v. Frawley* (2000) 82 Cal.App.4th 784, 791.) "The statute does not purport to render the conviction a legal nullity. Instead it provides that, except as elsewhere stated, the defendant is 'released from all penalties and disabilities resulting from the offense.' The limitations on this relief are numerous and substantial, including other statutes declaring that an

(*Acuna*, *supra*, 77 Cal.App.4th at p. 1059.) The court explained that the test is "'whether the Legislature intended the provision to constitute punishment and, if not, whether the provision is so punitive in nature or effect that it must be found to constitute punishment despite the Legislature's contrary intent.…'" (*Ibid.*, quoting *People v. Castellanos* (1999) 21 Cal.4th 785, 795 (*Castellanos*).) The court observed that, in *Castellanos*, the California Supreme Court upheld the application of the requirement that sex offenders register with the police to defendants who had committed their offenses prior to the enactment of the registration requirement. The *Castellanos* court explained that the purpose of the registration requirement was to ensure that sex offenders were readily available for police surveillance; the court then concluded that the registration requirement did not constitute punishment and therefore its application did not violate the ex post facto clause. (*Acuna*, *supra*, 77 Cal.App.4th at p. 1059, citing *Castellanos*, *supra*, 21 Cal.4th at p. 796.)

The *Acuna* court reasoned that the purpose of section 1203.4's provision precluding relief to persons convicted of violating section 288 was similar to the purpose of the sex offender registration requirement: "Police surveillance and public awareness are complementary. Thus, for example, our Legislature added section 290.4 in 1994[,] … [which] requires public officials to disclose information about registered sex offenders, including criminal history, to members of the public who inquire. The ban on expungement of convictions under section 288 is consistent with the policy of public disclosure. Our Legislature has determined that public safety is enhanced if those having been convicted of child molestation are not able to truthfully represent that they have no such conviction." (*Acuna*, *supra*, 77 Cal.App.4th at p. 1060.) The court concluded, "The

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order under section 1203.4 is ineffectual to avoid specified consequences of a prior conviction." (*Ibid.* [listing exceptions and limitations].)

intent of the Legislature in prohibiting expungement is not punishment but public safety." (*Ibid*.)

The next question was whether the 1997 amendment to section 1203.4 was so punitive in nature or effect that it constituted punishment regardless of the Legislature's intent. The *Acuna* court concluded that elimination of the possibility of section 1203.4 relief is not punitive in nature and effect. The court explained:

> "Expungement would not relieve [the defendant] of the duty to register as a sex offender. [Citation.] Nor would it prevent the use of the conviction as a prior conviction. (§ 1203.4, subd. (a).) He would still have to disclose the conviction in applying for a professional license [citation], or in an application for a public office [citation]. Nor would [the defendant] be able to own or possess a firearm capable of being concealed. (§ 1203.4, subd. (a).)
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> "There is no doubt that being unable to expunge [the defendant's] conviction places some burden on him. He cannot truthfully represent to friends, acquaintances and private sector employers that he has no conviction. But such a representation from a person convicted of molesting a child might give the public a false sense of security. It is this false sense of security the statute seeks to eliminate. As in *Castellanos*, the statute here is no more onerous than is necessary to achieve its purpose." (*Acuna*, *supra*, 77 Cal.App.4th at p. 1060.)

As a result, the court concluded the ex post facto clause did not bar application of the 1997 amendment to section 1203.4 to a defendant who was convicted of his offense and sentenced to probation before the amendment went into effect. (*Acuna*, *supra*, 77 Cal.App.4th at p. 1060.)

The *Acuna* court further rejected the defendant's claim that application of the 1997 amendment to section 1203.4 to him violated section 3, which provides, "No part of [the Penal Code] is retroactive, unless expressly so declared." The court explained: "We are not concerned here with the application of the amended statute to a petition filed or decided prior to the effective date of the amendment. Because the petition was decided

under the law as it existed at the time it was filed, there was no retroactive application of the amended statute." (*Acuna*, *supra*, 77 Cal.App.4th at p. 1061.)

Following the reasoning of *Acuna*, we reject Gonzalez's argument that applying the 2007 amendment to section 1203.4 to him violates the prohibition against ex post facto legislation. First, we agree with the Attorney General that the amendment is intended to protect public safety by preventing dangerous drivers from masking their records. It appears the Legislature has determined that "public safety is enhanced if those having been convicted of [certain Vehicle Code violations] are not able to truthfully represent that they have no such conviction," unless they obtain relief as a matter of discretion under section 1203.4, subdivision (c)(2). (*Acuna*, *supra*, 77 Cal.App.4th at p. 1060.) Second, eliminating section 1203.4 relief as a matter of right to persons convicted of certain Vehicle Code violations is not punitive in nature or effect for the reasons explained in *Acuna*. The *Acuna* court noted that relief under section 1203.4 would not relieve the defendant of the duty to register as a sex offender. (*Acuna*, *supra*, at p. 1060.) Similarly, in this case, relief under section 1203.4 would not affect any revocation or suspension of Gonzalez's privilege to drive a motor vehicle. (Veh. Code, § 13555.) Nor would a dismissal under section 1203.4 relieve Gonzalez of any immigration consequences of his convictions. (*Ramirez-Castro v. I.N.S.* (9th Cir. 2002) 287 F.3d 1172, 1175.) Finally, there was no retroactive application of the law in violation of section 3 because Gonzalez's request for relief was decided under the law as it existed at the time he filed his motion. (*Acuna*, *supra*, at p. 1061.)

II. The trial court did not abuse its discretion in denying Gonzalez relief

Under section 1203.4, subdivision (c)(2), "the court in its discretion and in the interests of justice, may order the relief provided pursuant to subdivision (a)" to a person with a conviction under the statutes described in Vehicle Code section 12810, subdivisions (a) to (e). Gonzalez requested this discretionary relief with respect to his

conviction for violation of Vehicle Code section 2800.2. In his motion, he noted he was "aware that there is no guaranteed expungement as to that offense."

On appeal, Gonzalez contends the trial court abused its discretion by denying his motion.

A. The trial court recognized it had discretion to grant relief

Gonzalez first argues the trial court failed to recognize that it had discretion to grant the relief requested. We disagree. The trial court explained it ruling, stating, "To begin with, … as the People state, there's no statutory, legal right for the court to reduce this." The court noted that Gonzalez had other criminal convictions for which he had received relief under section 1203.4, observing the current case "is not an isolated criminal event." It then considered Gonzalez's position that he was deserving of discretionary relief because of immigration concerns and his desire to seek employment. The court stated that relief under section 1203.4 would do "no good" for the purpose of applying for citizenship. It noted that, the previous month, a person had been granted discretionary relief where there was "a specific job available," but Gonzalez had failed to show any likelihood that he could obtain a job in the near future. The court concluded, "So with those factors, the court will once again deny the motion."

Gonzalez relies on the court's statement "there's no statutory, legal right for the court to reduce this" to support his position that the court believed it had no discretion to grant relief. We agree with the Attorney General that this statement "was merely an inartful way for the court to indicate that [it] was not mandated to grant the relief requested." Reading the trial court's entire ruling, it is clear the court recognized it had discretionary authority to grant relief under section 1203.4. The court began its statement, "*as the People state*, there's no statutory, legal right for the court to reduce this." (Italics added.) The People, however, did not take the position that Gonzalez had no statutory right to seek relief under section 1203.4 at all. Rather, they argued that he was not entitled to relief under section 1203.4, subdivision (a), as a matter of right. Thus,

we understand the court's statement "there's no statutory, legal right for the court to reduce this" to mean that Gonzalez had no *automatic right* to relief under section 1203.4, subdivision (a).

Our understanding of the court's statement is confirmed by the fact the court next considered Gonzalez's arguments in favor of granting discretionary relief, demonstrated it recognized its authority to grant discretionary relief by describing an example of granting such relief, and then determined that "factors" did not exist in this case to warrant such relief. Accordingly, we reject Gonzalez's argument that the trial court did not recognize that it had discretion to grant relief under section 1203.4, subdivision (c)(2).

B. Denial of discretionary relief was not an abuse of discretion

Finally, Gonzalez argues that the trial considered improper factors and drew conclusions not supported by substantial evidence in denying him discretionary relief. He argues that the trial court did not give the appropriate "deference" to his postprobation conduct "in which he had successfully abstained from criminal activity." We reject this argument.

In *People v. McLernon* (2009) 174 Cal.App.4th 569 (*McLernon*), the Court of Appeal considered the trial court's discretionary authority to grant relief under section 1203.4, subdivision (a), which allows the grant of relief "in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section." The *McLernon* court found that the plain language of the statute showed the purpose "was to give trial courts the power to set aside a conviction after the termination of probation *whenever* the circumstances warranted it." (*McLernon*, *supra*, 174 Cal.App.4th at p. 576, fn. omitted.) The court also examined the legislative history of the amendment adding the discretionary authority to grant relief under section 1203.4:

> "[T]he amendment was requested by the attorney for a defendant who, after a probation violation, completed his probation with no further violations, raised his child alone, and then went to college, worked without pay for the State Parole Board, and was trying to become a social worker. Although the trial court in his case expressed a desire to grant relief under section 1203.4, it concluded it could not do so because of the defendant's parole violation. The amendment to section 1203.4 was designed to give courts the ability to grant relief in these circumstances. [Citation.] Thus, in determining whether to grant relief under the discretionary provision, the trial court may consider any relevant information, including the defendant's postprobation conduct." (*McLernon*, *supra*, 174 Cal.App.4th a pp. 576-577.)

Subdivision (c)(2) of section 1203.4, like subdivision (a), provides that a court may grant relief "in its discretion and in the interests of justice." Therefore, the trial court in this case could "consider any relevant information" in deciding whether to grant Gonzalez discretionary relief. (*McLernon*, *supra*, 174 Cal.App.4th at p. 577.) Gonzalez argues that the trial court's consideration of immigration consequences "was an arbitrary and irrelevant consideration." However, given that Gonzalez asked the court to consider that his legal status would expire in the near future and that his convictions may have an adverse effect on his application to renew legal residency, we cannot fault the trial court for discussing the potential immigration consequences of granting relief under section 1203.4.[7] Further, Gonzalez ignores the two additional factors the trial court considered in reaching its decision. First, the court noted that Gonzalez had received section 1203.4 relief in other cases, so his current offenses were not an isolated criminal event. Second, it relied on the fact that Gonzalez had not shown that he had any likely employment prospects. Gonzalez does not argue that these factors were irrelevant, and we conclude they were relevant information. The trial court did not abuse its discretion

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[7] Gonzalez also asserts the court's immigration discussion was improper "speculation," but the court was correct insofar as the general rule is that convictions expunged under state law retain their immigration consequences. (*Ramirez-Castro v. I.N.S.*, *supra*, 287 F.3d at p. 1174.)

by denying relief where defendant has done no more than shown he "successfully abstained from criminal activity."

III. Count 2

In this criminal case, Gonzalez was convicted of two counts. After appellate briefing was completed, we invited the parties to address the following issue: did the trial court properly deny appellant relief under section 1203.4, subdivision (a), as to count 2?

We have received the responses, and the parties agree that Gonzalez was entitled to relief as a matter of right as to count 2. In *People v. Mgebrov*, *supra*, 166 Cal.App.4th at page 586, the Court of Appeal held that the relief provided in section 1203.4, subdivision (a), applies to specific offenses. Here, although count 1 is for an offense that is expressly excepted from relief as a matter of right under section 1203.4, count 2 is not such an offense. Accordingly, we agree with the parties that Gonzalez is entitled to relief under section 1203.4 as a matter of right with respect to count 2.

DISPOSITION

The trial court's order of March 20, 2013, is vacated and the matter is remanded with instructions to the trial court to enter a new order consistent with this opinion. The trial court's ruling is affirmed with respect to count 1.

_____
Kane, J.

WE CONCUR:

_____
Levy, Acting P.J.

_____
Cornell, J.